544E

Supreme Court, U.S.
FILED
AUG 21 2006
OFFICE OF THE CLERK

(10)

Nos. 05-908

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals For the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

MICHAEL E. ROSMAN
Counsel of Record
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, N.W., Suite 300
Washington, D.C. 20036
(202) 833-8400

Counsel for Amicus Curiae

August 21, 2006

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF *AMICUS CURIAE* 1
STATEMENT 1
SUMMARY OF ARGUMENT 5
ARGUMENT 6
I. THE ASSERTED INTEREST DOES NOT ALIGN WITH THE ACTUAL POLICIES OF THE SCHOOL DISTRICT. 6
II. THE SCHOOL DISTRICT'S RACE-BASED POLICIES HAVE NO ACTUAL OR LOGICAL ENDING POINT. 15
CONCLUSION 17

TABLE OF AUTHORITIES

Pages

Cases

Callins v. *Collins*, 510 U.S. 1141 (1994) 15

Church of the Lukumi Babalu Aye v. *City of Hialeah*, 508 U.S. 520 (1993) 11

City of Richmond v. *Croson*, 488 U.S. 469 (1988) 6, 15, 16

Gratz v. *Bollinger*, 539 U.S. 244 (2003) 1

Greater New Orleans Broadcasting Ass'n v. *United States*, 527 U.S. 173 (1999) 10

Grutter v. *Bollinger*, 539 U.S. 329 (2003) ..... passim

Hopwood v. *Texas*, 78 F.3d 932 (CA5 1996) 1

Rubin v. *Coors Brewing Co.*, 514 U.S. 476 (1995) 10

Shelley v. Kraemer, 334 U.S. 1 (1948) 17

Smith v. *University of Washington*, 392 F.3d 367 (CA9 2004) 1

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Rights (CIR) is a nonprofit public interest law firm founded in 1989 for the purpose of defending individual liberties against the unchecked authority of the federal and state governments. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003); *Grutter* v. *Bollinger*, 539 U.S. 329 (2003); *Smith* v. *University of Washington*, 392 F.3d 367 (CA9 2004); *Hopwood* v. *Texas*, 78 F.3d 932 (CA5 1996). This case involves just such an unconstitutional race-based system of assigning students to high schools, which trenches upon the essential liberties guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT

Seattle School District No. 1 (the "School District"), operates ten public high schools, which vary widely in quality and popularity. While the School District has never been segregated by law, the city of Seattle, which is 70% White and 30% non-White, does have racially concentrated housing patterns. The racial makeup of the public student population in the district as a whole is approximately 40% White and 60% non-White. The non-White student population consists of Asians, Blacks, Latinos, and Native Americans. The decision below does not discuss the overall percentages of such separate minority populations in the student population, but data from the panel decision suggests that in the 2000-01 school year the breakdown of total enrollment in the School District was approximately 23.8% Asian, 23.1% Black, 10.3% Latino,

---

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

2.55% Native American, and 40.2% White.[2] The decision says nothing about the breakdown in the high school population as opposed to the total student population in K through 12, but tells us that if all students attended the high school nearest their home, the schools would reflect the imbalanced housing patterns relative to Whites and non-Whites overall.

To address the perceived imbalances in high school enrollment as between Whites and non-Whites, the School District adopted what it has called the "open choice plan," which initially allows each student to attend any of the ten high schools. The plan places first and highest priority on student choice. Insofar as space is available – *i.e.*, a school is undersubscribed – students are allowed to attend the school of their choice without regard for racial balance. In schools where space is not available to accommodate all student choices – *i.e.*, where a school is oversubscribed – the School District then gives highest priority to students with a sibling at their first-choice school. Thus, student choice and parental convenience are the most important goals of the system.

To fill out the populations of oversubscribed schools after the sibling preference, the School District then looks to whether the school is racially balanced, defined to mean that its White and non-White populations would be within a 15% deviation of the percentages of Whites and non-Whites in the student population as a whole. If a school would have fewer than 25% Whites or greater than 55% Whites, the school then applies a racial admissions test in order to bring the school within that range – giving priority to Whites where they would otherwise fall below 25% of a particular school's

---

[2] Based on raw numbers for all but Native Americans, Pet. App. 249a, and an estimate of the Native American school population based on the average of the percentages of Native Americans for each of the ten high schools, Pet. App. 197a, titrated against the raw numbers of other groups and then added back to the total for such other groups and iterated again until stable. That process yields a total student enrollment in the School District of approximately 46,830 students.

population, and giving priority to non-Whites where Whites would be over 55% of the population. When the racial preferences have brought the percentages up or down to the desired amounts, or when the pool of preferred applicants is exhausted, the School District then gives priority to students who live closest to the school. The plan does nothing to address any racial imbalances in elementary or middle school.

During the 2000-01 school year, under a slightly different version of the open choice plan, attendance at 6 of the 10 high schools was determined entirely by student choice, and 3 out of those 6 schools reflected a 10% or greater variance from the student population regarding their percentages of Whites and non-Whites, which the School District at that time defined as "imbalanced." *See* Table 1, below (Cleveland, Ingraham & Ranier Beach deviate from student population ratios).[3] Four of the ten schools were both oversubscribed and would have been imbalanced as between Whites and non-Whites in the absence of race-based adjustments to admission. *See id.* (Ballard, Nathan Hale & Roosevelt would have been "disproportionately" White absent balancing, Franklin would have been "disproportionately" non-White).

---

[3] Pet. App. 197a (Table 1) (highlights added). Highlighted schools are those which are over-subscribed and hence subject to racial adjustment. The racial deviation applied during that school year was 10% from overall student population ratios, and there was no "thermostat" whereby the racial preference was turned off after the population had come back within the 10% White/non-White deviation.

Table 1: 2000-01 Demographics Without Racial Tiebreaker

School	Asian	Black	Latino	Native American	White	Non-White Overall
Ballard	14.7%	8.9%	9.6%	4.3%	62.5%	37.5%
Chief Sealth	27%	18%	21%	3%	32%	68%
Cleveland	43%	35%	10%	2%	10%	90%
Franklin	39.3%	34.6%	5.5%	0.8%	19.8%	80.2%
Garfield	12.5%	34.7%	4.4%	1.1%	47.2%	52.8%
Ingraham	38%	19%	9%	4%	30%	70%
Nathan Hale	17.4%	12.1%	6.4%	3.3%	60.8%	39.2%
Rainier Beach	30%	52%	8%	2%	8%	92%
Roosevelt	26.8%	6.7%	8.7%	3.0%	54.8%	45.2%
West Seattle	26%	15%	10%	2%	46%	54%

In those four oversubscribed and "imbalanced" schools, the School District applied its racial preferences, though in not a single instance did it succeed in bringing a school within the then-applicable 10% White/non-White deviation from the student population as a whole. *See* Table 2, below.[4] Indeed, in only one case, Franklin, did it barely succeed in meeting the current 15% deviation target. And Roosevelt, which was already within the 15% range without the racial preferences, would not even be subject to the current 15% plan.

[4] Pet. App. 203a (Table 3).

Table 2: 2000-01 Demographics With Racial Tie-Breaker

School	Asian	Black	Latino	Native American	White	Non-White Overall
Ballard	17.5%	10.8%	10.7%	4.6%	56.4%	43.6%
Franklin	36.8%	32.3%	5.2%	0.7%	25.1%	74.9%
Nathan Hale	17.9%	13.3%	7%	3.4%	58.4%	41.6%
Roosevelt	29.1%	7.7%	8.9%	3.1%	51.1%	48.9%

The decision below does not discuss what impact the racial balancing of the four oversubscribed schools had on the balance in the six undersubscribed schools. For all the court was concerned, White or non-White students denied entry into their first-choice oversubscribed schools may well have ended up at an undersubscribed school as their second choice – based on proximity to where they lived – and contributed to a greater imbalance in those schools.

SUMMARY OF ARGUMENT

Under the School District's racial gerrymandering system, the minimum percentage of Whites in oversubscribed schools reflects a rough approximation of the percentage of Whites in the student population of Seattle. Non-Whites are lumped together into a single group characterized solely by not being White and stripped of any consideration of their separate ethnic and racial characters. Further, the district applies its system only to oversubscribed high schools, denying elementary, middle, and undersubscribed high schools any of the purported benefits of diversity provided through racial balancing. The system is essentially arbitrary, targeting racial percentages around existing population figures rather than any theory about what proportion of various races are needed to attain the benefits of racial balancing. Those three factors demonstrate that the system is not narrowly tailored and the asserted

interest is neither compelling nor genuine. Finally, the system lacks a sunset provision and thus threatens to permanently entrench racial balancing without regard for a compelling need for such an odious mechanism.

ARGUMENT

I. The Asserted Interest Does Not Align with the Actual Policies of the School District.

When evaluating race-based government policies under strict scrutiny, this Court looks to the fit between the means and the purported ends in order, *inter alia*, to assess both the quality and genuineness of the asserted government interests. *See City of Richmond* v. *Croson*, 488 U.S. 469, 493 (1988) (strict scrutiny designed to smoke out illegitimate purposes). In this case, the School District and the Ninth Circuit have set forth a range of supposedly "compelling" interests in support of the School District's race-based student enrollment system. Those interests include:

> (1) Educational benefits such as promoting student discussion of racial and ethnic issues and adding different viewpoints to class discussion;
>
> (2) Social benefits such as increasing the likelihood of socializing with people of different races, preparing students for citizenship in a multi-cultural and multi-ethnic world, fostering racial and cultural understanding, and increasing integration later in life; and
>
> (3) Avoiding racially concentrated schools which are separate and unequal in that they have more poverty, lower achievement, less qualified teachers, and fewer advanced courses.

Pet. App. 20a-21a (Board Statement Reaffirming Diversity Rationale); *id.* at 23a-24a, 27a-28a.

But a review of the actual student enrollment system set up by the School District demonstrates that not only does it

lack a sufficiently tight fit between its race-based means and the allegedly compelling ends – and hence is not narrowly tailored – in many instances it actually works to the affirmative detriment of the purported compelling interests thus undermining both the supposedly compelling quality of those interests and the genuineness of the School District's assertion of those interests.

There are three principal disconnects between the means and the purported ends in the School District's scheme that demonstrate why it fails strict scrutiny.

First, the School District's race-based enrollment scheme for oversubscribed schools lumps all members of every race and ethnicity but "White" into one group, ignoring actual diversity in favor of a condescending dichotomy between White and non-White students. In practice the School District's approach is concerned only with the percentage of Whites in a given school, denigrates as interchangeable and equivalent the different groups composing the non-White student population, and ultimately undermines any genuine notion of the very "diversity" it claims to pursue.

The result of such a system is that a school can actually end up less diverse than it would otherwise be so long as it has an "acceptable" percentage of White students. For example, at the Franklin school during the 2000-01 school year, the projected 19.8% White student population without racial preferences was deemed too low and thus Whites were given priority admission over non-Whites, bringing the White percentage up to 25.1%. But at the same time, Latino and Native American students at Franklin, who already were considerably less numerous and hence more isolated than Whites, were actually decreased in order to make room for the additional White students. *Compare* Table 1 *with* Table 2, *supra* (5.5% Latinos and 0.8% Native Americans reduced to 5.4% and 0.7%, respectively).

While the changes in racial composition may be different for each school and for each year, the essential point is that the School District's scheme leaves such matters wholly to chance, and has no mechanism for considering representation of discrete groups within the minority community, or for providing such groups with a critical mass to allow their participation and contribution to diversity in any given school.[5] Indeed, the absurdity of the plan seems apparent in the fact that it would consider a school composed of 20% Whites, 20% Blacks, 20% Latinos, 20% Asians, and 20% Native Americans to be racially imbalanced, but would have no problem with a school that was 50% White and 50% Asian.

That the School District's plan permits an oversubscribed school to have very few members of *most* minority groups, so long as it has quite a few of at least *one* minority group and a minimum percentage of White students, evinces a stereotyped treatment of minorities as interchangeable. It effectively enacts as government policy the condescending notion that any minority group will benefit simply from exposure to White students and viewpoints, and that exposure to any single minority group is sufficient for the White students. That approach systematically undervalues the differences within the overall non-White population in the service of aggrandizing the difference between Whites and "others."[6]

---

[5] As there is no mechanism in the system whereby only members of the most numerous non-White group is proportionally reduced in favor of Whites, it stands to reason that every time the tiebreaker is applied, the school could reduce the number of students in a small minority group or completely lose a true minority group for the sole benefit of admitting more White students. Indeed, by focusing so intently on the White population in its oversubscribed schools, the School District's plan has the very real potential to deny all students exposure to minorities they could be *least likely* to interact with outside of school. The Seattle system thus risks furthering the very harm it seeks to reduce by removing truly underrepresented minorities to make room for more White students.

[6] The subtext of distributing White students to help non-White students can be seen in the Ninth Circuit's discussion of the interest in avoiding

Addressing the apparent lack of concern for diversity within the non-White population, the Ninth Circuit argued below that the focus on Whites versus non-Whites simply addresses Seattle's North/South housing segregation between Whites and non-Whites, and noted that such a bipolar approach is consistent with other laws lumping all minorities together for purposes of measuring isolation or achieving a critical mass. Pet. App. 50a-51a. The housing pattern argument is both disingenuous and fails to answer the question. That Whites tend to live to the North of Seattle and non-Whites to the South says nothing about housing patterns *within* the minority population to the South. It takes precious little imagination to recognize that there is likely similar segregation along the East-West axis in the South with Asians, Blacks, Latinos, and Native Americans tending to form their own geographic and racial enclaves. And recognizing that inter-minority tensions are increasing – between Blacks and Latinos, Asians and Blacks, etc. – again requires no raft of studies by sociology Ph.Ds.

As for other laws lumping minorities together, suffice it to say that such laws hardly amount to constitutional authority for their choices and are not self-validating. Indeed, they

---

separate and unequal schools that would provide a poor (*i.e.*, unequal) education for "colored children," and a better education for Whites. Pet. App. 31a. The notion that White schools are better than non-White schools, and hence that Whites need to be spread around to increase the quality of non-White schools, is both condescending and stigmatizing, contrary to the Ninth Circuit's view of the plan, Pet. App. 35a-36a, and contrary to the School District's claim that it does not want to be "insulting," toward minorities by using socioeconomics as opposed to race as a diversity criteria, Pet. App. 53a. Also, it is sad and ironic, to say the least, that the School District seeks to ameliorate the supposedly inadequate quality of racially concentrated schools by focusing exclusively on the most popular – and presumably best – oversubscribed schools while entirely ignoring the least popular – and presumably worst – undersubscribed schools, which in some cases are also the *most* imbalanced schools in the system.

would seem on their face to provide little support for such lumping together of discrete minority groups insofar as it is hard to imagine a lone Black or Latino student feeling materially less isolated because there were lots of Asians in addition to Whites, or a lone Asian student feeling a critical mass of comfort in a school split evenly between Whites and Blacks. Indeed, the very notion of diversity – touted by the school district – suggests that discrete cultural and racial identities are more meaningful than the bare commonality of not being White.

Given the substantial disconnect between the School District's claimed goals and benefits of "diversity" and its very limited and, indeed, stereotyped views of race that went into formulating this system of classification, the fit here between the ends and the means falls far short of the narrow tailoring required under strict scrutiny, and casts considerable doubt on the genuineness of the lofty goals the School District and the court of appeals below would find "compelling."

Second, the School District does not place a sufficiently high priority on the benefits of racial balancing to ensure that *all* of its schools have the proportion of White students that provide such supposed benefits. As this Court has noted elsewhere, the government's failure to seek its "compelling governmental interest" on a consistent basis – in this case, in each of the schools in the system, not merely the popular high schools – casts doubt upon whether the government genuinely believes that its stated interest is compelling. *Cf., e.g.*, *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 188, 192 (1999) (insufficiently vigorous or consistent pursuit of alleged government interest undermines asserted interest); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (inconsistencies and exceptions in the regulatory scheme undermined asserted government interest).

While the School District contends it has a compelling interest in obtaining racial balance, the District clearly does not place a very high priority on the resulting benefits, because it

does not even attempt to obtain these benefits for students in undersubscribed high schools (or in elementary and middle schools for that matter). The two most "unbalanced" high schools under the School District's definition – Cleveland and Rainier Beach – are not over-subscribed and thus not even subject to the plan. While the District's "Board Statement Reaffirming Diversity Rationale," claims that "the District's commitment is that no student should be required to attend a racially concentrated school," the plan certainly permits students to attend schools it defines as racially concentrated. If the School District were truly interested in promoting cross-cultural understanding, then it would have carefully crafted a plan that applied to all schools, not just the popular high schools.[7] Failure to pursue the interests of diversity and cross-racial understanding in a consistent way across the board is sufficient to demonstrate that those interests are not genuinely viewed as compelling and that the program does not meet strict scrutiny. *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546-48 (1993).

In this case the School District has consistently placed student choice and convenience (in the form of being at the same school as a sibling) ahead of diversity.[8] It is only in the

---

[7] Indeed, the failure to seek diversity in elementary and middle school tends to undermine the claims by the School District and the Ninth Circuit regarding the importance of multi-racial exposure at an early age, before racial attitudes are formed. The School District's interest can hardly be deemed compelling when it allows the very attitudes it decries to be formed in the first six or seven years of schooling and then only half-heartedly seeks to correct those attitudes in a fraction of its high schools.

[8] Indeed, the sibling preference would seem likely to exacerbate an existing racial imbalance in that it largely reinforces the racial distribution of the older classes, thus making it even harder to change that distribution by manipulating the racial distribution of the remaining incoming students. And, given that the racial preferences apply only to the *incoming* freshman class, the fact that that class has to compensate for imbalances in the school as a whole, and for subsequent transfers that "unbalance" the school, means that the freshman class itself will be disproportionately

popular oversubscribed high schools where some students will inevitably be denied their first choice that diversity comes into play, and even then it takes a back seat to parental convenience.

Third, the School District's determination of the "correct" proportion of White students is not based upon any social-science evidence but is based solely upon the availability of White students in the system. That is, whatever social-science data has to say about the benefits of diverse high school student bodies, the School District has offered no evidence that such benefits are tied to the 25% to 55% range of White students that it has mandated for its few oversubscribed schools. Given the School District's move from a 10% deviation as the measure of racial imbalance to a 15% deviation, it would appear that the entire exercise is simply an arbitrary fluctuation around the number of Whites that happen to be present in the system, not a considered determination of what percentages of different races are necessary to reap the benefits it claims, or to avoid isolation of particular racial groups.

Indeed, the fact that the targets are based on the proportion of Whites relative to non-Whites within the system, yet ignore the percentages of discrete groups within the non-White population, flatly ignores this Court's critical mass jurisprudence, which at least attempted to provide a rationale for setting minimum percentages of certain races in order to attain educational benefits. *E.g. Grutter v. Bollinger*, 539 U.S. 306 (2003).[9] In *Grutter*, the Court found that a class

---

skewed in the *opposite* direction of the school as a whole in order to offset the numbers in the three other classes. Thus, a substantially imbalanced incoming class coupled with the oppositely imbalanced remainder of the school would yield the fiction, though hardly the reality, of diversity in Seattle's popular high schools.

[9] In *Grutter*, the issue was having a sufficient minority population such that the students would not feel isolated, which is a justification quite distinct from the percentages of any groups in the applicant pool. Where the percentage of a given group in the pool is very low, a critical mass of stu-

consisting of a range between 12% and 21% minorities allowed minority students a critical mass such that they could express their views without isolation or tokenism. Yet apparently in Seattle, such a limited critical mass is too low for White students, who must be at least 25% in oversubscribed schools, and is entirely irrelevant for Asians, Blacks, Latinos, or Native Americans, any of which groups can be present in numbers below any critical mass so long as some other minority group or groups are present in higher numbers.

The arbitrariness of the critical-mass analysis here is even more evident when compared to the range imposed by the Louisville school district in *Meredith v. Jefferson County Board of Education.* There, the board imposed a range of White students between 50% and 85%. That is the *minimum* percentage of Whites *required* in Louisville schools (50%) is very near the *maximum* percentage of Whites permitted in Seattle schools (55%). Moreover, various acceptable proportions of White students in Louisville (*e.g.*, 60%, 65%) are unacceptable in Seattle, and proportions acceptable in Seattle (30%, 40%) are unacceptable in Louisville. Such differences in acceptable numbers are not based on any difference in educational judgment about when the benefits of diversity are triggered. Rather, they simply reflect different proportions of Whites generally available in the system and thus constitute naked racial balancing, not any pedagogically cogent theory of diversity as a teaching tool.[10]

---

dent may require a higher percentage at a subset of schools, rather than an equal distribution of that group across many schools. Likewise, where the percentage of a group is high, a critical mass of students may be found in numbers well below the total pool figures. Indeed, such variance from the racial proportions of the applicant pool was one of the main distinctions this Court relied upon in *Grutter* in rejecting the characterization of the program there as mere racial balancing. 539 U.S. at 336.

[10] Furthermore, given that both the past and present plan are almost entirely ineffective at achieving the supposedly "diverse" ratios in the affected high schools, *see supra* at 4, this Court must seriously question the

In addressing the lack of a cogent rationale for the School District's target numbers, the Ninth Circuit simply noted that other schools with race-based enrollment systems likewise look to existing percentages in the student population rather than to some independent theory regarding critical mass. Pet. App. 47a-48a. But the everybody-else-is-doing-it defense did not work particularly well *in* high school, and does not work well *for* high school race balancing. Rather, it just demonstrates that instead of doing the harder intellectual and academic work of figuring out what actually constitutes the minimum critical mass of students necessary to achieve the claimed benefits of diversity, most school systems take the lazy way out and just set targets around their existing numbers. Under strict scrutiny, however, race-based policies impose a heavy burden under, and are an offense to, the Equal Protection Clause, and consequently must be used to the least degree needed to achieve a compelling interest. Tracking existing population, plus-or-minus some variance, simply has no relation to reaching a critical mass of students (which may be more or less than the overall population figures), and hence cannot be shown to be narrowly tailored.

The School District here has provided no evidence that it is necessary or even beneficial to have the number of White students orbit near their proportion in the student population in order to attain the supposed benefits of diversity that it seeks. Yet given that race-based government action is presumptively and actually odious under the Equal Protection Clause, it would seem incumbent on the School District to limit its use of such tools to the absolute minimum necessary to attain its supposed compelling interests. Yet without co-

---

value the School District actually places on those ratios. An arbitrary goal that the School District cannot even meet hardly forms the basis for a compelling interest. Arbitrary deviation targets around equally arbitrary existing school population ratios, rather than objective evidence of critical mass or pedagogical benefits, are not even remotely the stuff of a compelling interest.

gent evidence of how much racial redistribution is necessary to achieve the benefits of diversity, the School District can *never* show that its solution is not overbroad and unduly burdensome to core constitutional values. The School District's race-based approach thus fails strict scrutiny.

* * * * *

The inconsistent, limited, and tepid pursuit of diversity through the use of racial classifications, and the blunt and essentially arbitrary details of the classifications actually used, stand as indictments not only of the Seattle system itself, but also of the entire enterprise of racial gerrymandering in the schools. Such gerrymandering, whatever the details, are inevitably arbitrary and based on racial stereotypes rather than individual character and contribution. Rather than let schools blindly experiment with the odious tools of race-based policymaking, this Court should reject such continued "tinker[ing] with the machinery of" racial classification. *Callins* v. *Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

II. The School District's Race-Based Policies Have No Actual or Logical Ending Point.

This Court in *Grutter* held that a system of racial preferences "must" have a sunset provision. 539 U.S. at 342. Racial preferences must sunset, according to the Court, because they are "potentially so dangerous that they may be employed no more broadly than the interest demands," leading to the conclusion that "enshrining a permanent justification for racial preferences would offend this fundamental equal protection principal." *Id.*; *see also id.* at 344 (Ginsburg, J., concurring) (additional reasons for a sunset provision). Further, in *Croson*, the Court held that one of the chief problems with a city plan that preferentially awarded subcontracts to minorities was the lack of a logical end point for the legislation. 488 U.S. at 498. Indeed, the majority argued that such a program could "extend until the percentage of public contracts

awarded" to minority owned businesses "mirrored the percentage of minorities in the population as a whole." *Id.*

In this case there is no dispute that the School District's race-based plan lacks a sunset provision. The Ninth Circuit defended such deficiency by arguing that the School District revisits the plan annually, has been responsive to changing political pressures by occasionally adjusting the plan to place other interests above diversity, and by presuming that the School District will end the program when there is no longer a need for it. Pet. App. 61a. That non-answer simply contradicts this Court's stated need for a sunset provision in the first place. Periodic adjustments and the Ninth Circuit's optimism that the race-based policy will end at some unspecified future point hardly address the unique dangers posed by race-based decisions. And they do not account for the fact that policies tend to become entrenched, and thus sheer inertia could keep them in place in the absence of a sunset provision.

Furthermore, it is hard to imagine the circumstances under which the need for racial cross-understanding could not be used as a rationale to allocate coveted spaces in oversubscribed schools. Common sense dictates that schools can become over-subscribed for many reasons, such as construction of a new facility, availability and quality of extracurricular activities, perceived quality of the faculty, size of the school, the school's surrounding neighborhood, and a host of other intangibles of which race is at best one. It follows that the District's plan does not have a "logical end point." *See Grutter*, 539 U.S. at 342. This Court has wisely recognized that a completely equal society will not, in every one of its spheres, mirror the racial make up of its inhabitants, and should do so again here. The lack of a sunset provision in the School District's racial gerrymandering scheme suggests it will be a perpetual system of racial balancing, not a narrow program to address a temporary and compelling need.

* * * * *

As this Court has noted, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). The Seattle plan denies certain students the opportunity to attend their first choice school because of their race. Whether those denied are "White" or "other than White," their personal rights are violated by a system erecting skin color as a criterion for allocating this limited resource.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully Submitted,

MICHAEL E. ROSMAN
Counsel of Record
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, N.W., Suite 300
Washington, D.C. 20036
(202) 833-8400

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amicus Curiae

Dated: August 21, 2006.